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LAW MAKING IN THE PEOPLE'S REPUBLIC OF CHINA:
TERMS, PROCEDURES, HIERARCHY, AND INTERPRETATION

中国当前立法问题研讨

Tao-tai Hsia
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TABLE OF CONTENTS

I. Introduction 1

II. Legislative Authority 1

III. Legislation of the NPC and Its Standing Committee . . 4

IV. State Council Enactments 8

V. Local Statutes 11

VI. Rectifying the Legal Structure: Planning, Screening, and Compilation 13

VII. Interpretation of the Law 19

VIII. Policy and Law 24

IX. Translations 29

X. Conclusion 30

Appendix 33

LAWMAKING IN THE PRC: TERMS, PROCEDURES, HIERARCHY, AND INTERPRETATION

I. Introduction

For a long period before the fall of the Gang of Four and the adoption of the policy of "opening up" to the outside world in the late 1970s, the People's Republic of China (PRC) did not promulgate a great number of major laws. Lawyers in the U.S. and other Western nations did not have much interest in the legislation that was passed. Now, however, there are many people doing business in China with a need to use Chinese law, and there is a great deal more Chinese law available for study. Among the many obstacles along the path to understanding Chinese law are such fundamental problems as the relationship between law and party policy, the existence of unpublished regulations, and the adoption of laws on a "provisional" basis. The terms and hierarchy present more technical complexities, including the problem of distinguishing between different types of laws, enacted by different bodies and varying in significance. A further complication is that the Chinese themselves are not consistent in their use of legal terminology. In addition, the lack of standardization in translation of legal terms and titles can add to the confusion. This essay focuses primarily on the more technical aspects of lawmaking, with some comments on the question of party policy and its role in the legal system.

II. Legislative Authority

Although China is a country composed of many ethnic groups, some of whom have a small degree of autonomy to develop their own laws, it is a unitary, not a federated state. Major legislation comes from the central power

organs; local legislation is permitted because of China's size and diversity, but is limited in scope. 1/ According to articles 62 and 69 of the current Constitution, the supreme power organs of the state with legislative authority are the National People's Congress (NPC) and its Standing Committee. 2/ The NPC has the right and obligation to make and revise constitutions and "basic laws" [jiben falu] 基本法律. The term "basic law" has never been defined, but it includes such things as the major codes. Chinese jurists tend to consider anything enacted by the NPC itself as a basic law. The Standing Committee may enact laws other than basic laws and revise basic laws when the NPC is not in session, but any revisions should not be in conflict with the spirit of a basic law as produced by the NPC. 3/ The administrative organs of the state are also empowered to make certain types of laws. 4/ The State Council and its subordinate organs can promulgate regulations [fagui] 法

1/ The word "law" is used in two different ways in this essay. The first is in a broad sense, meaning all types of legally binding norms. The second refers to a particular subset of those legal norms with the title of "law" as opposed to "regulation," "measure," etc.

2/ Constitution of 1982. Widely available in English translation, see the loose-leaf set Constitutions of the Countries of the World, produced by Oceana Press.

3/ See discussion in Faxue jichu lilun [Theses on the Bases of Law] 340-341 (Beijing, Beijing University Press, 1984). Translated titles of articles, books, or journals are as given in the original. Where no translated title was provided, we have given a literal translation.

4/ Art. 89, §1, Const.; art. 10, Organic Law of the State Council, Dec. 10, 1982, available in English in Foreign Broadcast Information Service, Daily Report: China (FBIS), Dec. 15, 1982, at K1-K2.

规 that are considered narrower in scope and less important than NPC or Standing Committee laws [falu] 法律 .[5]

In the years since the PRC was founded, a great number of laws and regulations with a large variety of designations have been issued. In 1955, the "Report Summarizing the Work of Systemizing Laws," by the Fazhi ju [Legal Enactment Bureau] 法制局 of the State Council, already noted this profusion of designations for legislation. The report stated that the forerunner of the State Council, the Government Administration Council, and its subordinate organs had issued legal documents with more than 40 designations, including tiaoli [regulations] 条例 , banfa [measures] 办法 , tiaokuan [articles] 条款 , guiding [provisions] 规定 , shouze [rules for observation] 守则 , daoze [guiding principles] 导则 , and yuanze [principles] 原则 . Furthermore, local governments at various levels had also created many different types of laws.[6] There was then no systematic method of issuing designations for laws, and no way to determine the rank of a law by its designation. Today, China is still facing this confusion and Chinese jurists have begun to turn their attention to the issue.[7]

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[5] The English word "regulation" is used as a translation for two different Chinese words. The first is fagui, a category of legal enactments usually of lesser significance than the category falu [laws]. The second is tiaoli, a term used in the title of certain individual enactments. For clarity, the Chinese transliteration will be used together with the English "regulation."

[6] Dec. 30, 1955, printed in 2:6 Zhengfa yanjiu [Political-Legal Research] 312-315 (Dec. 1956); also quoted in Liu Han, "Normalization of the Legal System and the Names of Laws and Regulations," 1983:6 Faxue [Jurisprudence] 5-12, 5 (June 10, 1983).

[7] Liu, id.; see also his "Opinions on the Standardization and Normalization of the Form of Law," 1984:6 Faxue yanjiu [Studies in Law] 14-20 (Dec. 1984).

The 1982 Constitution contains only general provisions on the subject of legislative authority. NPC enactments fall into two broad categories, falu [laws, understood in a narrow sense] and jueyi [resolutions] 决议. The laws enacted by administrative organs can be collectively called xingzheng fagui [administrative regulations]行政法规, and those enacted by local governments can be termed difangxing fagui [local regulations]地方性法规. The term faling [decrees]法令 is no longer used in the present Constitution (1982) and thus is not of use as a descriptive category.

III. Legislation of the NPC and Its Standing Committee

Under the first Constitution of the People's Republic, that of 1954, there was only one organ with legislative power, the National People's Congress. The Chinese Communists used the 1936 Soviet Constitution, which had similarly provided for a single legislative body, as a model. The arrangement quickly proved to be unworkable, and in 1955, the Second Session of the first NPC authorized the Standing Committee to enact individual laws. The scope of legislative activity of the Standing Committee was expanded in 1959, when the First Session of the Second NPC authorized that Committee to revise laws when the NPC was not in session. The current Constitution specifically authorizes the Standing Committee to enact laws, in part because the pace of modernization is such that the legislative process must operate more swiftly than in the past. The NPC as a whole not only meets infrequently, it is unwieldy in size, with nearly 3500 members. It is thus necessary that the 200-person Standing Committee take on legislative functions. 8/

8/ See discussion by Sun Bingzhu, "The Legislative Power of the Standing Committee of the NPC," Xianfa lunwen ji: xubian [Collected Essays on the Constitution: Second Part] 257-259 (Zhang Youyu ed., Beijing, The Masses Press, 1982). See also Liu Shengyang, "An Understanding of Our Country's Legislative System," at 263-269.

The NPC itself produces such basic laws as the Constitution and major legal codes. There are several ways for a bill [faan] 法案 to be introduced there. The NPC's Presidium, a body consisting of about 200 members elected by the NPC delegates, 9/ may submit a bill. The Standing Committee and other NPC Committees also have this right. Article 70 of the Constitution specifies that the NPC Committees shall include the following: Nationalities; Law; Finance and Economy; Education, Science, Culture and Public Health; Foreign Affairs; and Overseas Chinese. These committees, under the direction of the NPC or the Standing Committee, examine, discuss, and draw up bills and draft resolutions. When the NPC is in session, any group of 30 or more deputies or any delegation from an electoral unit may introduce a bill. According to Zhang Xin, who formerly taught in the Law Department at Peking University, bills introduced by such groups are added to the agenda only at the discretion of the Presidium. 10/ The State Council may submit a draft bill, as may the Supreme People's Court, the Supreme People's Procuracy, and the Central Military Commission; their bills must eventually appear on the agenda. Once submitted, any bill may be sent by the Presidium to committee for consideration or may be sent directly to the various delegations, before the full session votes on it. 11/

9/ Art. 61, Const.

10/ Zhang Xin, "How New Laws Come Into Effect," South China Morning Post (Hong Kong), Mar. 14, 1986, at 2.

11/ Arts. 9-10, Organic Law of the NPC, adopted Dec. 10, 1982, available in English translation in FBIS, Dec. 17, 1982, at K6-K13, K8.

When bills go through the Standing Committee, the actual work of examining texts is done by the Legal Work Commission [fazhi gongzuo weiyuanhui] 法制工作委员会. 12/ This Commission, which consists of some Standing Committee members as well as legal scholars from outside the Committee, will research the subject, review the proposed bill, and suggest any needed changes. The Commission is to be distinguished from the Law Committee [falu weiyuanhui] 法律委员会, under the NPC itself, which consists only of delegates and is parallel to other NPC committees. In discussing the two law bodies, an associate researcher at the Institute of Law of the Chinese Academy of Social Sciences stated that the Law Committee makes policy, but the Legal Work Commission does the actual groundwork of research for new legislation. 13/ At times, however, the two bodies work together to examine a proposed law. 14/

The laws enacted by the NPC should, it has been argued, all be titled fa [law], as in Hunyin fa [Marriage Law]婚姻法. The Standing Committee also can enact documents titled fa, as well as tiaoli [regulations]. Tiaoli enacted by the Standing Committee generally have the same format as

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12/ The Chinese term literally is Legal System Work Committee. The term "work" was added to help distinguish it from the NPC Law Committee. Here we have used the translations given in Central Intelligence Agency, Directory of Chinese Officials: National Level Organizations 27-28 (June 1985).

13/ Xie Huaishi, quoted in "China's Legislative Work," 1985 Guangjiao jing [Wide Angle] 91-93 (Oct. 16, 1985).

14/ Information on legislative procedure of the Standing Committee in the Work Report of the Standing Committee of the NPC, presented by Chen Pixian, Vice-Chairman of the Standing Committee, May 26, 1984, text in Zhongguo nianjian 1985 [People's Republic of China Yearbook 1985] 89-91 (Beijing, New China Publishing Co., 1985); summary in English translation in FBIS, May 29, 1984, at K6-K9.

fa, and the same validity. It has been suggested that a legal norm created by the Standing Committee could be called a tiaoli for two reasons: 1) When there is some uncertainty as to how its provisions will work in actual practice, but the need to enact a piece of legislation is urgent. After a few years of experience, the tiaoli could then reach fa status. 2) Items that are relatively small in scope might also most appropriately be called regulations [tiaoli] rather than laws. 15/ While this second reason seems like a useful means of distinguishing between documents of different value enacted by the same body, the Standing Committee, the first reason for using the term tiaoli is not so valid. It is always possible to term a law "provisional" and the Chinese do this quite frequently. There is no logical basis for confusing the standardization process by creating a duplicate mechanism for temporary or tentatively-promulgated laws.

The NPC or the Standing Committee may also issue documents in another category, resolutions [jueyi]. Some of these contain legal norms and thus may be considered a part of the lawmaking process. These include amendments or supplements to laws, which become integral parts of the existing laws, as well as the orders promulgating basic laws, which include the date of adoption and the effective date. Other types of resolutions, those not considered a part of the body of law created by the NPC, include such documents as notifications about the organization of a conference or lists of appointments.

15/ Liu, supra note 6, at 6.

IV. State Council Enactments

The State Council establishes administrative regulations [xingzheng fagui]. The designations used for these enactments include tiaoli [regulations], banfa [measures], guize [rules]规则, guiding [provisions], and shixing xize [detailed rules for implementation]施行细则. Detailed rules for implementation (e.g., the Detailed Rules for the Implementation of the Individual Income Tax Law of the PRC, and so on) are issued together with or after the promulgation of the more general law. In structure, all of these documents are similar to the laws enacted by the NPC or its Standing Committee. Since the Standing Committee also uses the term tiaoli in its enactments, there can be confusion as to which body promulgated a particular regulation. Liu Han, a prominent Chinese jurist, has suggested that the Standing Committee call all its enactments fa [law], so that tiaoli could be reserved for administrative measures. 16/ Another possible solution would be to use "law" only for legislation enacted by the NPC, reserve "regulations" [tiaoli] for the Standing Committee, and require all administrative actions to be termed "measures" or "provisions." This would differentiate even further on the basis of promulgating body.

There are various routes an administrative regulation [xingzheng fagui] may take through the Chinese government. Under the State Council, each subordinate ministry or commission has designated people responsible for drafting laws. Therefore, before a bill is proposed by the State Council, a draft version is usually prepared by the appropriate subordinate unit and then submitted to the Council for examination. While the State Council is authorized to enact administrative regulations entirely on its own, in some

16/ Liu, supra note 6, at 9.

cases the approval of the NPC or its Standing Committee is required. One example is the Decision on Rehabilitation Through Labor of 1957, which was supplemented in 1979. The Standing Committee approved the supplement. 17/

In addition to fagui, the administrative organs of the state generate a great number of other documents. The titles for these are governed by the Provisional Measures on Handling Official Documents of the State Administrative Organs. 18/ Article 5 specifies that the terms "order" [mingling]命令 or "decree" [ling]令 should be used for statutes that enforce major administrative measures or for the appointment, removal, commendation, or punishment of personnel. "Directives" [zhiling]指令 are for documents of instruction and regulation in economics and in scientific research. The arrangement of problems or major actions should be through a "decision" [jueding]决定 , and "resolutions" [jueyi] should be documents that have been discussed and passed for implementation. "Instructions" [zhishi]指示 are for assigning and clarifying the guiding principles for work for lower level government organs.

According to the Provisional Measures, "announcements" [gonggao] 公告 , "public notices" [bugao] 布告 , and "notices" [tonggao] 通告 are for declarations of major events, promulgations to the masses, and promulgations that are somewhat limited in their scope of distribution, respectively. A "circular" [tongzhi] 通知 should be used to transmit

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17/ Guo Zizhao, "Enactment of Laws," Zhongguo da baike quanshu: faxue [China Encyclopedia: Jurisprudence] [hereafter China Encyclopedia] 88-89 (Beijing, Encyclopedia Press, 1984).

18/ Adopted by the State Council, Feb. 27, 1981, 1981:5 Zhonghua renmin gongheguo guowuyuan gongbao [Gazette of the State Council of the PRC] [hereafter State Council Gazette] 152-158 (May 15, 1981); summary in English in China Official Annual Report 1982/3 276-277 (Hong Kong, Kingsway International, 1982).

instructions from higher to lower organs, between parallel organs with no direct connection, and in approving and transmitting official documents at the lower levels. "Notifications" [tongbao] 通报 are used to praise or criticize individuals and to pass on information needed by government organs. Work is reported by lower to higher authorities in the form of "reports" [baogao] 报告 and a "requisition for instructions" [qingshi] is used to ask for instructions and approval. The response by a higher organ to a qingshi should be classed as a "reply" [pifu] 批复. Finally, the Provisional Measures specify that "letters" [han] 函, be used in consultations between government offices.

There is considerable overlap in the definitions of these terms for administrative documents, so that it might be hard to determine whether a particular communication between government bureaus should be a letter or a circular, for example. Yet these Provisional Measures are a positive step for the Chinese legal structure, in that they at least recognize the need to systematize the types of documents issued. No such attempt has yet been made for major laws [falu] and regulations [fagui].

China has no general, legal definition of the types of subjects to be regulated by the State Council and its subordinate organs rather than reserved for treatment by the Standing Committee of the NPC. One discussion of the subject is included in a general treatise on law by Li Buyun that has a preface by Zhang Youyu, one of the vice-chairmen of the Law Committee of the NPC, and thus may reflect the official view. Li suggests that administrative regulations [xingzheng fagui] are appropriate as organic statutes for state bureaus, defining their nature, tasks, and powers; as personnel regulations, including hiring, firing, promotion, training, transfer, and

retirement of government officials; as administrative procedures; as management rules within agencies; and as procedures for handling disputes between such agencies and individuals. 19/ In 1985, the Standing Committee did specially authorize the State Council to enact temporary regulations [tiaoli] and provisions [guiding] dealing with the economy. The reason given for this decision was that the need to make laws was pressing, but that for the sake of stability the NPC and its Standing Committee had to move slowly and deliberately. The temporary regulations are designed to fill in gaps in the legal structure; eventually, many will be replaced by laws [falu]. 20/

V. Local Statutes

Locally enacted regulations [difangxing fagui] fall into three categories. The first is regulations needed to implement the laws of the central government that must fit local conditions. The Electoral Law for the NPC, for instance, specifies in article 44 that provincial people's congresses and their equivalents in directly administered cities and in the autonomous regions "may formulate detailed rules on elections for implementation in accordance with this law." 21/ A second category is regulations of a supplementary nature. Provincial regulations on family planning are an example, as the central Marriage Law calls for family planning in a general way but has no detailed provisions on the subject. The third type of local regulation deals with strictly local issues. Heilongjiang Province's regulation

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19/ Li Buyun, Fazhi, minzhu, ziyou [Legal System, Democracy, and Freedom] 31 (Chengdu, Sichuan People's Press, 1985).

20/ Zhongguo fazhi bao [China Legal News], Feb. 18, 1985, at 3.

21/ Adopted July 1, 1979; Chinese text in Zhonghua renmin gongheguo falu huibian 1979-1984 [Collection of Laws of the People's Republic of China, 1979-1984] 70-81 (Beijing, People's Press, 1985).

on the control of seeds for local crops, for example, addresses an issue not covered in any national legislation. All local laws must in theory be consistent with relevant provisions of national law and policy. 22/ The Legal Work Commission of the Standing Committee reviews such locally enacted regulations for constitutionality; the State Council checks those regulations to make sure they are not in conflict with any administrative laws. 23/

In October 1985, Yunnan Province adopted a set of provisional rules on the enactment of local laws. The rules covered such topics as the scope of local regulations, the drafting process, passage and approval, promulgation, reporting to the NPC and State Council, subsequent revisions, supplements or abrogations, and interpretation. 24/ On the question of the scope of local regulations, the rules describe types of enactments similar to those outlined above, adding that regulations can be adopted when judicial or procuratorial work requires it and when "the enactment of local laws and regulations is required by the Kunming Municipality [the seat of the provincial government]" (art. 4, §5-6). Regulations must be published in the provincial gazette and in the newspaper (art. 11, §2). The relevant committee of the provincial people's congress can interpret texts, and the provincial government, courts, and procuracy and the Standing Committee of the Kunming

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22/ See Cui Liwen, "Categories of Local Legislation," 1985:3 Zhengzhi yu falu [Politics and Law] 31-33 (June 5, 1985).

23/ Supra note 13.

24/ Passed by the Standing Committee of the Yunnan Provincial People's Congress, Oct. 14, 1985; text reported in Yunnan ribao [Yunnan Daily] (Kunming), Oct. 15, 1985, at 2; report translated in Joint Publications Research Service, China Report: Political, Sociological, and Military Affairs (JPRS), Jan. 28, 1986, at 42-47.

Municipal People's Congress "shall provide interpretations on the actual application of the local laws and regulations" (art. 14). If Yunnan Province has such rules, it can be presumed that other provinces may either already have or may be in the process of adopting similar ones.

According to a report in the Overseas Edition of the People's Daily, 744 pieces of legislation were enacted at the provincial level between January 1, 1979, and the end of July 1986. Among them, 279 (37.5 percent) deal with financial and economic matters, including the special economic zones, technology import, joint ventures, environmental protection, and land control. This reflects the national emphasis on developing economic law for China's modernization. 25/

VI. Rectifying the Legal Structure: Planning, Screening, and Compilation

The need to plan and coordinate new legislation and the principles for drafting those laws are frequently discussed by Chinese jurists. 26/ While law should have the character of stability, they argue, it must also be able to change to meet new circumstances, so long as those changes take place in accordance with legal procedure. This understanding of law is viewed by these jurists as consistent with socialism, which considers law a part of the superstructure of society, a reflection of the economic base. When economic relations change, law must change with them. In addition, law should be both principled, that is, clear and concrete, and flexible, so that it can deal with varieties of human behavior. This amounts to a kind of rationale for vaguely written, broad laws that allow wide variation in application. The

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25/ July 31, 1986, at 1.

26/ Chen Shouyi, "Researches in Law During the Past Thirty Years of the PRC," 1 Zhongguo faxue wenji [Essays on the Law of China] 13-32, 25-27 (Beijing, Legal Press, 1984); Faxue jichu lilun, supra note 3, at 348-350.

Criminal Code, for instance, has provisions for more severe punishment in "especially serious" cases, with no definition of the term "especially serious," making interpretation vital. 27/

Law planning is frequently discussed in light of modernization and the side effects of increased trade and industry. A prime example is the need to enact laws to protect the environment. The Chinese are aware that social change on many levels must be considered in the planning process. 28/

In the last six years, economic legislative work at both the central and local levels has been seen as an important tool for China's modernization and a major focus of efforts to plan legislation. 29/ The need to make economic laws, particularly those designed to handle foreign trade and investment, has been broadly cited; the idea is that foreign investment can best be attracted when the legal structure is complete. 30/ The style of lawmaking in the economic area is different from that found in other subject areas; foreign trade rules tend to be less ideological and more concrete than other types of laws. The influence of foreign models can be seen in such

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27/ Chen Shouyi, supra note 26, at 27.

28/ Mu Dayin and Ren Yunzheng, "Planning and Design in Legislation," 1983:6 Zhengzhi yu falu 6-12, 7 (Sept. 1983).

29/ Provincial level meeting on law planning emphasizing economic law, described in report of the Gansu Provincial News Service, Nov. 13, 1985, translated in JPRS, Jan. 7, 1986, at 113.

30/ See for example Gu Ming, "The Present and Future of China's Foreign Economic Legislation," reprinted in section D41, "Law," of 1985:2 Fuyin baokan ziliao [Reprinted Newspaper and Journal Materials] 23-27 (Beijing, China People's University, 1985); "Concerning Our Country's Economic Legislation," Zhongguo jingji nianjian 1982 [China Economic Yearbook 1982] IV--103-109 (Beijing, Economic Yearbook Committee, 1982).

legislation as the Patent Law, for which extensive study of the procedures employed in other countries was undertaken.

The need to undertake such studies and to systematize the process of making economic laws was recognized in July 1981 when the Economic Law Research Center was established under the State Council. 31/ The Center studies important questions related to the planning, enacting, and revising of economic laws and coordinates the drafting work for those laws. In addition to its tasks directly related to legislation, the Center organizes scholarly research programs. The Center has drawn up and submitted to the State Council a list of eight proposals on strengthening economic legislation, which can be summarized as follows:

1) Leaders at all levels should emphasize economic legislative work, and there should be someone monitoring progress in this area in each relevant government agency and in all localities.

2) Emphasis should be placed on adjusting, reforming, and enacting the most urgently needed laws.

3) Economic legislation should incorporate domestic experience and foreign knowledge. Pieces of legislation deemed not completely ready for enactment as formal law should be adopted as transitory laws, with such designations as shixing caoan [draft for trial implementation] 试行草案. Once tried out in practice, these laws can be more formally adopted.

31/ See Zheng Ming and Shi Rong, "Economic Law Research Center," Zhongguo baike nian jian 1982 [China Encyclopedic Yearbook 1982] 272 (Beijing, Xinhua Books, 1982). The Center recently merged with the Legal Enactment Bureau, and the new body's status has been elevated to that of an agency directly under the State Council.

4) There should be a legal office in each agency under the State Council that deals with the economy. Legal research organs and teaching units should consider setting up economic legal advisors' offices to serve as consultants to government agencies.

5) Economic legislation should be centrally planned, under the guidance of the State Council.

6) Implementation of economic laws should be more closely supervised. Courts and procuracies should have economic divisions, and mediation and arbitration procedures should be improved.

7) The training of personnel in the economic law field should be strengthened. Cadres experienced in economic work should be trained in law, and universities should be urged to offer economic law courses and short-term programs.

8) The contents of laws should be well publicized. 32/

By and large, China has tried to implement these proposals in the last few years. Economic divisions of courts have been established, training work has been emphasized, and the press has given a great deal of publicity to new economic laws. The most important development has been the establishment of the Center itself, which can function as a clearinghouse for economic legislation. In 1982, a year after these proposals were submitted, a plan for drafting economic laws for 1982-1986 was developed by the Center and approved

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32/ "Several Proposals on Strengthening the Lawmaking Work of the Economic Law Research Center of the State Council," 1981:19 State Council Gazette 593 (Oct. 25, 1981). The proposals were dated Sept. 3, 1981. It should be noted that certain regulations are considered confidential, for internal government use (neibu 内部). See Hsia, Hambley, and Johnson; "Introduction to the State Secrets Laws of the PRC," 2:4 China L. Rep. 267-278 (Fall 1983).

in principle by the State Council and the Legal Work Commission of the Standing Committee of the NPC. 33/

In the early years of the People's Republic, two basic statutory collections were published. The first of these, the Zhongyang renmin zhengfu faling huibian [Collection of Laws and Decrees of the Central People's Government] 中央人民政府法令汇编, included enactments from September 1949 through September 1954, when the first Constitution was promulgated. The second, the Zhonghua renmin gongheguo fagui huibian [Collection of Laws and Regulations of the People's Republic of China] 中华人民共和国法规汇编, covers September 1954 through De ember 1963. After that time, publication of legal compilations ceased, a casualty of internal political movements.

Following the renewed emphasis on the legal system, a one-volume compendium of laws enacted by the NPC and its Standing Committee from 1979 to 1984 has recently been published, but none of the administrative regulations [fagui] promulgated by the State Council and other agencies has been included. 34/ A more comprehensive series, covering one year per volume, is in progress. 35/ This would be a successor to the earlier statutory collections. It would be very difficult to issue volumes for the years

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33/ Mu and Ren, supra note 28, at 12; Wang Zhengming, "China Is Drafting an Economic Legislative Program During the Seventh 5-Year Plan," Liaowang [Outlook], Jan. 27, 1986, at 9-10, reprinted in FBIS, Feb. 14, 1986, at K17-K20.

34/ Supra note 21.

35/ Zhonghua renmin gongheguo fagui huibian [Collection of Laws and Regulations of the People's Republic of China], described in Sheke xinshu mu [Social Science New Book List], Oct. 30, 1985, at 1.

between 1963 and 1979, as during the Cultural Revolution period it was particularly hard to distinguish between policy and law and records of legislation were not complete.

It has been suggested that future compilations divide enactments into categories based on the promulgating authority, the subject content, or both. 36/ Organization by subject headings would be particularly useful for researchers.

Compilation alone, however, is not considered an adequate method of dealing with the accumulation of legal texts. There is also a need to screen the laws, both to check for constitutionality and to determine where there are redundancies or lacunae in the legal structure. Chinese jurists have written about this need in relation to particular topics in the law, such as economic law, 37/ scientific and technical statutes, 38/ and finance legislation. 39/ Zhang Youyu has pointed out that some laws presently in force date from before the 1982 Constitution and are not compatible in spirit with that document. Furthermore, because the hierarchy of laws and the demarcation of types of lawmaking authority have not been clear, there are many existing statutes that are not consistent. Zhang feels that a complete analysis of legal norms is necessary. 40/

36/ Liu, supra note 6, at 9.

37/ See China Economic Yearbook 1982, supra note 30, at 107.

38/ Zhongguo fazhi bao, Nov. 1, 1985, at 1.

39/ Report on the subject from the Ministry of Finance, discussed in Zhongguo faxue [Chinese Jurisprudence] (Nov. 9, 1985), according to advertisement in Zhongguo fazhi bao, Oct. 11, 1985, at 4.

40/ Jiang Jiyao, "Comrade Zhang Youyu Opens Discussion on Questions on Our Country's Progress in Building the Legal System," 1984:6 Faxue 1-3 (June 10, 1984).

China has already screened thousands of existing laws, with the intention of insuring that those in conflict with the Constitution, the basic laws, or current policy be abolished or revised as needed. 41/ Eighteen of the agencies under the State Council have reportedly finished the process, with 70 percent of the regulations [fagui] promulgated by the State Council itself and 60 percent of the secondary enactments, usually those from subordinate agencies, found superfluous or in need of amendment. Local governments have also begun to screen their regulations [difangxing fagui], and Hebei Province, Beijing, and Tianjin have found that about two-thirds of the legal norms need change. 42/

VII. Interpretation of the Law

The issue of which bodies have the authority to interpret laws is addressed in the Constitution and in the Resolution on Strengthening the Legal Interpretation of Laws, which was passed by the Standing Committee of the Fifth NPC as an amendment to the 1955 Standing Committee Resolution on the Interpretation of the Law. 43/ The earlier resolution had provided for interpretation only by the Standing Committee or the Adjudication Committee

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41/ This process has been widely reported, see for example "Some Ministries Straighten Out Regulations," Xinhua Hong Kong Service in Chinese, July 9, 1985, translated in FBIS, July 12, 1985, at K6-K7; Meizhou huaqiao ribao [China Daily News] (New York), July 11, 1985, at 4.

42/ Meizhou huaqiao ribao, id. As of July 1985, 1,108 fagui promulgated by the State Council and 13,693 lesser regulations had been reviewed.

43/ June 10, 1981. Chinese text in the State Council Gazette, Aug. 20, 1981, at 366-367; available in English in 1 Major Laws of the People's Republic of China (Honolulu, East-West Center, 1984). Unpaginated.

of the Supreme People's Court. 44/ The need to expand this statement on interpretation became apparent following the enactment of five major laws and two major codes (the Criminal Code and the Code of Criminal Procedure) in 1979. Questions had been raised in applying the Criminal Code on such points as the meaning of "intentional killing" and the need for proof of resistance in order to establish rape. 45/

In discussing the question of legal interpretation, most jurists distinguish between formal and informal interpretation; formal interpretations are those made by state organs and have legal force. The Standing Committee of the NPC interprets the Constitution and laws enacted by the NPC, as well as those it enacts itself. 46/ The State Council and the ministries it leads interpret administrative regulations [xingzheng fagui], and locally enacted regulations [difangxing fagui] are interpreted by the organs that issued them. 47/ Naturally, interpretations of local legislation are binding only in the jurisdiction concerned.

44/ Resolution on Interpretation of Legal Problems, June 23, 1955, 1 Zhonghua renmin gongheguo fagui huibian [Collection of Laws and Regulations of the PRC] 163 (1956); reported by Xinhua News, June 23, 1955, translated in Survey of China Mainland Press, no. 1076, June 24, 1955, at 2.

45/ See discussion in Wu Daying, "The Interpretation of the Country's Socialist Laws," 1984:4 Zhengzhi yu falu 42-46 (Aug.1984), translated in JPRS, Jan. 31, 1985, at 9-127, 12-13.

46/ Art. 67, §1 & §4, Const.

47/ See discussion in Tang Zongyao, "Interpretation of the Law," China Encyclopedia, at 81. See also Wu, supra note 45.

In some cases, laws may include provisions on their interpretation. For example, the Criminal Code states that the terms "more than" and "less than" as used in the text are inclusive of the number they qualify, a point that is frequently unclear in Chinese writing. 48/ Similarly, article 58 of the Code of Criminal Procedure contains definitions of the terms "investigation," "parties," "legal representatives," "participants in proceedings," and "close relatives," as used elsewhere in the Code. 49/ In other cases, a law, or the implementation rules for a law, may include clauses specifying the appropriate interpretive organ. 50/

Interpretive information on a law may sometimes also be found in a report issued by the drafting organ at the time the law was promulgated. Such reports, if adopted by the legislating organs, have the same legal force as the law itself. Peng Zhen's report to the NPC on the Criminal Code, the Code of Criminal Procedure, and other laws adopted at the same time is an example of this type of explanatory document. 51/ These reports could be useful should questions of legislative intent arise, as minutes of legislative bodies are not routinely published.

48/ Art. 88, July 1, 1979, available in English in The Criminal Law and the Criminal Procedure Law of China 5-64, 34 (Beijing, Foreign Languages Press, 1984).

49/ July 1, 1979, id., at 111-168, 132-133.

50/ Wu, supra note 45, at 14.

51/ "Guanyu qige falu caoan de shuoming" [Explanation of the Drafts of Seven Laws], available in Chinese in Renmin ribao [People's Daily], July 1, 1979, and reprinted in 1979:6 Xinhua yuebao [New China Monthly] 40-45.

Another category of interpretation is judicial interpretation. Judges at any level who interpret a law in the process of applying that law to a particular case do not create binding authority. The Supreme People's Court and the Supreme People's Procuratorate may make binding interpretations on trial and procuratorial work, respectively, as long as these are separate from any particular case decision. When the interpretations of those two bodies are in conflict, the Standing Committee of the NPC resolves the difference. 52/ Although in theory only the Supreme People's Court and Procuracy may create binding judicial interpretations, in practice the Ministry of Justice and the Ministry of Public Security may work jointly with them in interpretation of the law in application. In this area, there is a link between judicial and administrative interpretation. 53/ It is still unclear, however, who has a right to ask for an interpretation. In some cases, it is the provincial level courts that have posed questions to the Supreme People's Court for interpretation. 54/

Informal interpretation refers to non-authoritative comments on the law and includes all forms of scholarly writings. These interpretations may deal with the wording of a law, its internal logic, the relationship of one law to another, or legislative history. This kind of interpretive material is of value both to the academic community in China and abroad and as a means

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52/ Wu, supra note 45; Tang, supra note 47; Resolution, supra note 44.

53/ Wu, id. at 13.

54/ See for example 1985:1 Zuigao renmin fayuan gongbao [Gazette of the Supreme People's Court] 19 (May 25, 1985).

of publicizing the law. 55/ Informal interpretation, when printed in the general media, may become a part of the public discussion of a legal issue. For instance, Wang Shuwen, director of the Institute of Law of the Chinese Academy of Social Sciences, has written an interpretation of article 31 of the Constitution which is a comment on the constitutionality of the formula for Hong Kong's future, "one country, two systems." 56/

There are still issues that need resolution in relation to authoritative interpretation of the law. A major problem is the existence of unpublished laws and their relation to published laws. Another question is which organ will properly interpret the basic law for Hong Kong in the future. The Constitution specifies that the NPC enacts the basic law for a special administrative region, the type of governing structure proposed for Hong Kong after 1997. According to the Constitution and the resolution on legal interpretation cited above, this law, once enacted, should be subject to interpretation by the NPC's Standing Committee. Yet Hong Kong commentators on the subject have been arguing that it should be interpreted locally. There are terms that will undoubtedly appear in the basic law, such as "freedom of speech," that will be open to interpretation and that have had widely different meanings in Hong Kong and China in the past. 57/ Allowing local interpretation, however, would probably require an amendment to the Constitution.

55/ Discussed in Tang, supra note 47.

56/ "Establishing Special Administrative Regions Is an Important Policy of Our Country," Renmin ribao, Sept. 28, 1984, at 5.

57/ Lin Dawei, "Hong Kong Should Have the Right to Interpret the Basic Law," Guoji ribao [International Daily], Dec. 30, 1985, at 2.

VIII. Policy and Law

In China, policy and law are linked. Whenever something is not explicitly covered in law, policy prevails with a force close to that of law. Frequently, for example, policy statements by key party or state officials appear in the legal gazettes and in collections of laws, and a report on the 1982 Constitution of the PRC was included in a volume of laws enacted during 1979-1984. 58/

The lack of a national law on a subject does not mean that programs in that area have not been centrally directed. The principle that policy operates with near legal status in the absence of law was incorporated into a Chinese Communist Party (CCP) directive issued in 1949, on the eve of the conquest of the mainland. That directive abolished the laws of the Nationalist (Kuomintang) regime and affirmed the legal system that had been in place in the areas controlled by the Communists. 59/ Chen Shouyi, a noted contemporary jurist, after discussing this directive, describes the role policies play by stating that they are to be followed by the people and that if cadres violate policy they are committing a serious mistake. Law and policy are both reflections of the will of the people, he argues, and thus are both essential tools of the party and the nation in socialist revolution and construction. The party makes policy for the people and sometimes announces it jointly with the State Council. 60/

58/ Peng Zhen, "Report on the Draft of the Revised Constitution of the People's Republic of China," Collection of Laws of the PRC, 1979-1984, at 634.

59/ "Directive Regarding the Abolition of the Kuomintang's Complete Book of Six Codes and the Affirmation of the Legal Principles in the Liberated Areas, February 1949," quoted in Chen Shouyi, supra note 26, at 14.

60/ Chen Shouyi, supra note 26, at 24.

In a legal treatise designed to popularize knowledge of the law, it is argued that where the legal structure is incomplete, policy must function as law. One of the points made by way of illustration is that a complete civil code has not yet been enacted; there are thus many areas in which policy must prevail. 61/ Even in the future, when the legal structure will presumably be more complete, the authors feel that law will still sometimes be supplemented by policy. 62/ Furthermore, it is sometimes said that laws should be enacted after a policy has been tested in practice, when it is considered appropriate to make the policy more permanent. 63/ This attitude toward the relationship between policy and law is not unique to China. It was capsulized by Lenin, who said that the party's resolutions are incomplete laws. 64/

Further indication of the binding nature of policy can be seen in the Organic Law of the Local People's Congresses and Local People's Governments of the PRC. Article 8 of this law, in describing the functions of the people's congresses of local government units, states that they are to enforce "the Constitution, laws, policies, decrees, and orders of the state...," thus listing policies together with other legal documents. 65/ In another provision, the law gives the standing committees of the people's

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61/ Only the General Principles of the Civil Code of the PRC have been promulgated (on Apr. 12, 1986). They become effective Jan. 1, 1987.

62/ Feng Ertai et al., Falu wenda sibai ti [400 Questions and Answers on Law] 7-8 (Shanghai, Xuelin Press, 1982).

63/ Chen Shouyi, supra note 26, at 25.

64/ Quoted in id.

65/ Art. 8, §1, translated in FBIS, July 27, 1979, supp. no. 019, at 3.

congresses of provinces, autonomous regions, and municipalities the right to make local statutes, provided they do not contradict "the Constitution, laws, policies, decrees, or administrative orders of the state...." 66/

There have been times in which the party had even stronger domination than at present, and slogans like "politics is the soul of law" were common. Particularly in the Maoist period, law [falu, or fa in combinations] was almost invariably linked with politics [zhengzhi政治, or zheng政] in Chinese texts. The term zhengfa政法 was ordinarily used to refer to both politics and law with the character denoting politics preceding the one for law. This usage has been much more frequent in periods during which the party's strength has been especially great in relation to that of the state.

As a result of the new emphasis on legality over the last few years, both the state and the party constitutions now provide that the CCP shall function within the law. Article 5 of the state Constitution reads, "All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law." The CCP Constitution says in its General Programme, "The party must conduct its activities within the limits permitted by the Constitution and the laws of the state." 67/ This is potentially the most important clause in the entire document, as it relates directly to the power of the CCP and the nature of one-party rule. Even within the same paragraph, however, there is a contradiction. If the party is subject to the laws of the state, it cannot legitimately supervise the state's lawmaking

66/ Art. 27, supra note 65, at 7.

67/ English text for the party Constitution is available in 25:38 Beijing Review 8-21 (Sept. 20, 1982).

body. Yet the Constitution says:

> [The party] must see to it that the legislative, judicial and administration organs of the state and the economic, cultural, and people's organizations work actively and with initiative, independently, responsibly and in harmony. 68/

The fact that politics do still dominate law can be seen in both the structures and the operations of the Chinese legal system. In reality, the highest judicial decision-making body, higher than the Supreme People's Court and the Supreme People's Procuratorate, is the Political-Legal Committee or Zhengfa weiyuanhui 政法委员会 of the CCP. Law schools under the Ministry of Justice are called Zhengfa xueyuan 政法学院. This is usually translated as Institute(s) of Politics and Law, but Political-Legal Institute(s) is probably a better translation. 69/ Courses on Communist ideology, as interpreted by the current leadership, are required at all Chinese law schools for both the regular four-year courses of study and the special shorter training programs. While such courses are included in the programs for all disciplines in China, they are given particular emphasis in law schools.

In January 1982, just eight months before the party Constitution was finally adopted, the Central Committee issued a directive on th

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68/ Supra note 67, at 10.

69/ There are several such Institutes in China, for example: Huadong (East China--in Shanghai), Xinan (Southwest--in Chungking), and Xibei (Northwest--in Xian). Another, in Beijing, has recently merged with other institutions to become the Zhongguo Zhengfa Daxue, literally Chinese Political-Legal University.

importance of strengthening political-legal work. 70/ Throughout the document, the term zhengfa is used, and in many statements party committees are listed before parallel government organs. The concluding paragraph states that in political-legal work the leadership of the party committees at all levels should consist of managing policy, cadres, and ideology and supervising the corresponding political-legal organs of the state. 71/

Documents of a legal nature are sometimes even issued jointly by the CCP and the state. Almost invariably, the press lists the party first, and then the state as issuing organ. The title of the document itself may also list the party first. One recent example is a statute prohibiting cadres from engaging in business and running enterprises, promulgated jointly by the CCP Central Committee and the State Council. 72/ The following designations are frequently used for policy documents: gangling [outline]纲领, jiangyan [pronouncement], jueyi [resolution], kouhao [slogan]口号, shengming [announcement]声明, and xuanyan宣言 [declaration]. 73/

It is thus generally recognized that CCP policy can be a strong factor, both in formal legislation and in cases where no enacted law exists.

70/ This directive, dated Jan. 13, 1982, was published in a Taiwan journal. See "Chung kung chung yang kuan yu chia ch'iang cheng fa kung tso te chih shih" (Zhonggong zhongyang guanyu jiaqiang zhengfa gongzuo de zhishi) [Chinese Communist Central Committee Directive on Strengthening Political-Legal Work], 17 Chung kung yen chiu (Zhonggong yanjiu) [Studies on Chinese Communism] 130-137 (May 5, 1983).

71/ Id. at 137.

72/ Promulgated Feb. 4, 1986, reported with the party organ listed first by Xinhua Hong Kong Service in Chinese, Feb. 5, 1986, report translated in FBIS, Feb. 7, 1986, at K1-K3.

73/ Li Xirong et al., Faxue zhishi tujie [Diagrams of Knowledge of Legal Studies] 13 (Beijing, The Masses Press, 1984).

One issue that has not been settled, however, and that is currently under discussion in China, is whether law or policy should prevail when there is a conflict between the two. In a review of the question, Li Buyun has pointed out that although law is based on policy, there will inevitably be some contradictions. He describes three current schools of thought on how to resolve these contradictions: follow policy, follow law, or handle each situation separately, using case-by-case concrete analysis. Where the law is obviously wrong, in this third approach, policy should be followed, and where policy is incorrect, law should rule. Li comments that this third viewpoint avoids the issue of developing a principle for determining what is right for a particular situation. His opinion is that law should always be followed in cases of conflict, and that even though a policy changes, the relevant law should remain in force until properly revised or amended. 74/

IX. Translations

For Americans and other foreigners studying Chinese law, there is an additional source of confusion in the lack of consistency in translations. The PRC does not consider any translation "official"; even those produced by government agencies are provided for the convenience of those who do not read Chinese, rather than as a valid alternative to the Chinese text. The reason for this is obviously that there might be a discrepancy between the Chinese text and the translation. At present, most of the English translations of texts that are available, other than those provided by PRC government organs and published by Foreign Languages Press or by serials such as the Beijing Review, are done by two U.S. government agencies, the Foreign Broadcast

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74/ Supra note 19, at 69-70.

Information Service and the Joint Publications Research Service, or by law firms. There is little coordination in the translation of terms for laws, and this adds to the difficulties of researchers.

In 1983, the East-West Center in Hawaii held a conference on PRC law that addressed some of the current problems with translations, but more work is needed. While there are obviously some arbitrary decisions made in doing any translation, it would be of value to the field to have, at minimum, a standard list of translations for designations of laws. A list of the English translations of terms used in this essay has been attached as an appendix. As an example of the inconsistency at present in the field, the new Commerce Clearing House loose-leaf set entitled China Laws for Foreign Business translates xize sometimes as "Detailed Rules and Regulations," a redundancy, and sometimes as just "Detailed Rules." Guiding has been rendered as "regulations," as has tiaoli. The lack of standardization is of course even more obvious when one compares volumes by various translators and publishers. Furthermore, translations are frequently printed with no indication of who translated them or the source of the Chinese original, and so the reader has no way to ascertain the accuracy of the translation.

X. Conclusion

Since 1956, Chinese jurists have been concerned about the need to standardize the legislative process, clarify designations used for laws, and screen existing statutes. 75/ China is still in need of a method to deal with the mass of laws and regulations [fagui] enacted by various authorities

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75/ Du Peishan et al., "The Importance of Screening and Standardization of Laws in the Work of Our Country," 2:6 Zhengfa yanjiu 316-318 (Dec. 1956).

and given many different types of titles without consistency. In some other civil law systems, the problem is addressed either in the Constitution or in a special statute. 76/ Taiwan, for example, has a Law on the Standardization of Central Laws and Regulations. 77/ This Law leaves much to be desired and has not always been scrupulously followed in practice, but it does define two basic categories of legal norms: laws and decrees. Laws may be called fa [laws]法, lu [statutes]律, tiaoli [regulations]条例, or tongze [general principles]通則. Decrees, known collectively as mingling命令, include documents with the titles guize [rules]規則, xize [detailed rules]細則, and banfa [measures]办法, among others.

The Taiwan law standardizing legislation specifies that laws must be adopted by the Legislative Yuan and promulgated by the President, while decrees can be issued by administrative agencies. It further defines the types of matters that must be handled in the form of laws rather than decrees. Stipulations on the format, hierarchy, revision procedures, and abolition of laws are included. In addition, there are articles on the implementation and application of laws, including the provision that specialized laws are deemed superior to general laws on the same subject. The lack of a similar provision in the PRC may lead to problems of conflict

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76/ The hierarchy of legal norms is discussed as a part of legal theory in George E. Glos, "The Normative Theory of Law," 11 Wm. & Mary L. Rev. 151-184 (1969).

77/ Enacted Aug. 31, 1970, text in Tsui hsin liu fa ch'uan shu (Zuixin liufa quanshu) [Most Recent Complete Book of the Six Codes] 91-93 (Taipei, San-min Books, 1985). The law contains 22 articles arranged in 6 chapters.

between laws. For example, the Regulations on the Punishment of Counter-revolutionaries 78/ and the Criminal Code deal with some of the same crimes in different ways, and both appear to be still in force. In the absence of a law like Taiwan's on the standardization of legislation, there is in theory no clear way to resolve the conflict.

The People's Republic of China has been emphasizing the strengthening of its legal system in the years since the death of Mao Zedong and the fall of the "Gang of Four." So far, stress has been laid primarily on enacting statutes to meet urgent needs. The modernization plans of the Deng regime require this. The slogans you fa ke yi [to have a law on which to rely] 有法可依 and you fa bi yi [if there is a law, follow it] 有法必依 have been used to summarize these goals. Yet basic questions on the nature of the laws need to be answered. Many statutes are enacted in "provisional" form, with no time limit attached to the term "provisional." The designations for laws are not consistently delimited; there is no unique designation for instance, for laws adopted by the Standing Committee of the NPC. Standardizing legal forms, clarifying the hierarchy of legal authority, systematically reviewing legislation already in force, and resolving the question of the relationship between law and policy would be steps toward a stronger legal structure.

78/ Feb. 20, 1951, available in translation in Law Annual Report of China 1982/3 280-281 (Hong Kong, Kingsway International, 1982).

APPENDIX

Proposed Translations of Law Designations and Related Terms

banfa	办法	measures
baogao	报告	reports
bugao	布告	public notices
daoze	导则	guiding principles
difangxing fagui	地方性法规	local regulations
faan	法案	bills
fagui	法规	regulations
falu	法律	laws
Falu weiyuanhui	法律委员会	Law Committee
Fazhi gongzuo weiyuanhui	法制工作委员会	Legal Work Commission
gangling	纲领	outlines
gonggao	公告	announcements
guiding	规定	provisions
guize	规则	rules
han	函	letters

jiangyan	讲演	pronouncements
jueding	决定	decisions
jueyi	决议	resolutions
kouhao	口号	slogans
ling	令	decrees
lu	律	statutes
mingling	命令	orders
pifu	批复	replies [to qingshi]
qingshi	请示	requisitions for instructions
shengming	声明	announcements
shixing caoan	试行草案	drafts for trial implementation
shixing xize	施行细则	detailed rules for implementation
shouze	守则	rules for observation
tiaokuan	条款	articles
tiaoli	条例	regulations
tongbao	通报	notifications
tonggao	通告	notices

tongze	通则	general principles
tongzhi	通知	circulars
xingzheng fagui	行政法规	administrative regulations
xize	细则	detailed rules
xuanyan	宣言	declarations
yuanze	原则	principles
zhengfa	政法	political-legal
zhiling	指令	directives
zhishi	指示	instructions